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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

ANDREW KYRIACO, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners are Andrew Kyriaco, as Treasurer of Jordanos' Inc., and Jordanos' Inc.; John L. Jordano, Jr., as President of Pacific Beverages Company, and Pacific Beverages Company; John L. Jordano, Jr., as President of Chef's Vendors, Inc., and Chef's Vendors, Inc.; John L. Jordano, Jr., as President of Jorland, Inc., and Jogland, Inc.; John L. Jordano, Jr., as President of Jorlease, Inc., and Jorlease, Inc.; and John L. Jordano, Jr., as President of Jantro Investment Company, and Jantro Investment Company, Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 28, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at 16a-19a. The opinion of the United States District Court for the Central District of California, reported at 300 F. Supp. 968 (1969), appears in the Appendix hereto at 1a-15a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 28, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Section 7602 of the Internal Revenue Code of 1954 authorizes the issuance of summonses to compel the production of books and records "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . , or collecting any such liability . . . ." Such summonses, unlike search warrants used in criminal investigations, (a) are issued routinely by the investigating agent rather than an independent magistrate, and (b) are issued and enforced without a requirement that the Government show probable cause to investigate.

The questions presented in this case are:

1. Whether section 7602 authorizes the Internal Revenue Service to use such summonses when the sole or principal purpose of an investigation is

to establish a prosecutable criminal case against the taxpayer.

2. Whether the Fourth Amendment precludes the use of such summonses when the sole or principal purpose of an investigation is to establish a prosecutable criminal case against the taxpayer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 26:

> § *7602. Examination of Books and Witnesses.*
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account con-

taining entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

Petitioners are six corporations and officers thereof. The case arose when respondent Moriyama, a Special Agent of the Internal Revenue Service, served petitioners with summonses issued under section 7602 of the Internal Revenue Code.[1] The summonses ordered petitioners to produce corporate books and records for various taxable years ranging from 1963 through 1967. When the Service refused to give assurance that no evidence discovered through inspection of the records would be used in any criminal prosecution, petitioners refused to produce the records.

Respondent Moriyama petitioned the United States District Court for the Central District of California to enforce the summonses pursuant to sections 7402(b) and 7604(a). Petitioners objected to enforcement on several grounds, including the contentions that (i) section 7602 does not authorize a summons when the purpose of an investigation is to obtain evidence for a

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[1] Unless otherwise noted, section references are to the Internal Revenue Code of 1954, 26 U.S.C. §§ 1 *et seq.*

criminal prosecution, and (ii) the Fourth Amendment does not permit a search in these circumstances in the absence of a warrant issued by an independent magistrate upon proof of probable cause.

As the District Court noted, the Revenue Service had completed a routine audit of two of the petitioner corporations in early 1967. Then, sometime during the latter part of 1967, the Intelligence Division[2] had independently received information of possible unreported income of one of the individual petitioners for years that had already been audited. Respondent Moriyama, a Special Agent of the Intelligence Division, was assigned to the case in February 1968. A full-scale criminal investigation followed, in the course of which Moriyama issued the summonses in question. (App. 4a-6a.)

In seeking to determine the purpose of the investigation, the District Court observed that the present case did not involve a "continuing investigation of tax liability," or a situation "where criminal liability may be a *possible result* of the determination of tax liability." (App. 12a-13a. Emphasis supplied.) It found that this case involves an "investigation where tax liability is to be determined *only as a necessity to a prosecutable criminal case.*" (App. 13a.) (Emphasis supplied.) In reaching this conclusion, the court recognized that Special Agents are "criminal investigators charged with the responsibility of investigating criminal violations of the tax laws of the United States." (App. 13a.) The court observed that in this

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[2] The Intelligence Division is the criminal investigative arm of the Internal Revenue Service. See n. 15 *infra*, and accompanying text.

case Moriyama was "performing his function as a special agent in its classic sense." (App. 14a.)[3]

Despite these findings, District Judge Real felt "compelled" to order enforcement in this case because of the recent Ninth Circuit decision in *Hourfield, Inc.* v. *United States*, 409 F.2d 694 (1969). He read that case as holding that section 7602 summonses could be used for any investigation unless there was a "criminal prosecution in esse." (App. 15a.) No criminal case was pending against petitioners.[4]

On appeal the Ninth Circuit reaffirmed its earlier ruling in one brief paragraph:

> Appellants contend that enforcement of the summonses would offend the Fourth Amendment because they were issued solely to determine if a criminal violation had occurred. In *Hourfield, Inc.* v. *United States*, 409 F.2d 694, 697 (9th Cir. 1969), we stated that "summonses to examine taxpayer's records, obtained pursuant to 26 U.S.C. § 7602, may be used even where their purpose is allegedly to uncover crime, when no criminal case is actually pending against the taxpayer." [App. 18a. Citations omitted.]

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[3] The District Court rejected as transparent the Government's contention that Moriyama had issued the summons for the purpose "of ascertaining the correctness of corporate income tax returns." (App. 13a.) As the court declared, "ascertaining tax liability in the instant case was only one of the steps in the investigation being conducted by petitioner Moriyama to determine whether or not respondents are criminally liable for violations of the tax laws of the United States." (App. 14a.)

[4] In early 1970, the Chief of the Intelligence Division wrote one of the individual petitioners and one of the corporate petitioners informing them that criminal proceedings against them were being considered. This type of notification is given when a Special Agent has completed his investigation and recommended prosecution.

Following its decision, the Court of Appeals denied petitioners' motion for a stay of mandate and granted the Government's motion that the mandate issue forthwith. The mandate of the Ninth Circuit issued on May 15, 1970. On May 26, 1970, Mr. Justice Douglas granted petitioners' motion to recall the mandate and stay its reissuance.

REASONS FOR GRANTING THE WRIT

1. The issue in this case—whether administrative summonses issued under section 7602 may be used for the purpose of establishing a prosecutable criminal case—is presently before the Court in *Donaldson* v. *United States*, No. 65, October Term, 1970. This case, however, presents the issue more fully because (i) there was no evidentiary hearing or finding in *Donaldson* regarding the purpose of the Revenue Service investigation, and (ii) *Donaldson* does not present the constitutional dimensions of the issue.

2. The decision below contravenes section 7602 by permitting the use of Internal Revenue summonses for the purpose of establishing a prosecutable criminal case.

3. The decision below violates the Fourth Amendment because it permits searches for criminal evidence without prior review by an independent magistrate and without proof of probable cause.

4. The issue whether section 7602 summonses may be used to investigate crime has generated recurring litigation, conflicting views among the courts of appeals, and a substantial burden on the administration of the tax laws.

DISCUSSION

I. The "Improper Purpose" Issue Is More Fully Presented Here Than in Donaldson

On February 27, 1970, the Court granted certiorari in *Donaldson* v. *United States*, No. 65, October Term, 1970. The petitioner in that case sought review of the question whether the taxpayer under investigation has a right to intervene in proceedings seeking judicial enforcement of Internal Revenue summonses served on third parties. He did not seek review of the other question he had presented below: whether the summonses in his case were improper because issued for the "express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States . . . ."[5] In its response to the petition for certiorari, the United States did not oppose the grant of a writ to resolve the intervention issue. In addition, the Government in effect requested the Court to pass upon the "improper purpose" issue:

> Finally, it has become necessary in almost every Internal Revenue summons enforcement proceeding to argue and litigate the contention of the respondent or intervenor that the summons is improper if the investigation includes an effort by the Internal Revenue Service to determine whether the tax delinquencies include criminal violations. The dispute revolves on the meaning of this Court's language in *Reisman*, *supra*, and on its reference to the right to judicial review of an administrative summons which is issued for an "improper purpose" in *United States* v. *Powell*, 379

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[5] *United States* v. *Mercurio*, 418 F.2d 1213, 1215-16 (5th Cir. 1969), *cert. granted sub nom. Donaldson* v. *United States*, No. 65, October Term, 1970.

U.S. 48, 58. Since the court below held that no "improper purpose" existed merely because the investigations might disclose a criminal violation, this issue would appear to be embraced in a grant of certiorari to review the right of petitioner to intervene in this case. [Memorandum for the United States at 6-7.]

The instant case is a far better vehicle than *Donaldson* for consideration of the improper purpose issue, for in that case there was no evidentiary hearing or detailed findings regarding the nature and purpose of the Revenue Service investigation. The trial and appellate courts in *Donaldson* considered the petitioner's improper purpose contention solely on the basis of pleadings, oral arguments, and legal memoranda. The District Court did not write an opinion, and the Court of Appeals did not independently assess the facts. In consequence, it is not clear in *Donaldson*, as it is in the instant case, that the sole or principal purpose of the investigation was to establish a prosecutable criminal case.

Furthermore, the posture of the instant case makes it possible to cast full illumination on the improper purpose issue. The books and records summoned here belong to the petitioners. It is they who are under criminal investigation. The case does not involve the additional complexities, present in *Donaldson*, which arise when a taxpayer seeks to intervene to object to summonses directed at the books and records of a third party. This case is the root of the improper purpose issue; *Donaldson* is the branch.

Finally, *Donaldson* does not present the constitutional aspects of the improper purpose issue. The Court of Appeals in that case, noting that the interven-

ing taxpayer had no standing to raise Fourth Amendment rights of third parties and no such rights of his own to assert, emphasized that "[w]e have merely a problem of statutory construction of Section 7602." 418 F.2d at 1218. Petitioners submit that the improper purpose issue can be adequately considered only in a case, such as the present one, which involves both the statutory and the constitutional aspects of that issue.

For the above reasons, resolution of the improper purpose issue in *Donaldson* will not put that issue to rest or stem the tide of litigation over Internal Revenue summonses. Petitioners pray that a writ of certiorari be issued to review the decision below so that all essential aspects of the question can be considered by the Court at one time.

2. The Decision Below Permits Investigations in Excess of Statutory Authorization

Although the District Court found that the summonses in question were issued to establish a prosecutable criminal case, it sanctioned their use because there was no "criminal prosecution in esse." (App. 15a.) The Court of Appeals affirmed on the same basis. Petitioners submit that the interpretation of section 7602 made below is in conflict with the plain meaning of the statute, unsupported by legislative history, and contrary to traditional canons of statutory construction.

Section 7602 authorizes the use of summonses for the compulsory examination or production of books and records,

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has

> been made, determining the liability of any person for any internal revenue tax . . . , or collecting any such liability . . . .

By the unmistakable import of its language, the section is directed solely towards the investigation, determination, and collection of civil tax liabilities.[6] Nothing in its wording refers to the enforcement of criminal tax laws or to investigations undertaken in order to discover or prove that such laws have been violated.[7] Indeed, in *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964), this Court seemed to put the civil nature of the statute beyond doubt when it declared:

> [W]e hold that in any of these [enforcement] procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 9 Cir., 239, F.2d 767, 772-773 . . . . .[8]

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[6] There is no room to argue that the "liability" which may be investigated under section 7602 includes criminal "liability." The last phrase in the portion of the statute quoted above makes it clear that the "liability" which may be investigated under the section is a "collectible"—i.e., monetary—liability.

[7] Section 7608(b) recognizes the duty of Special Agents to enforce the criminal provisions of the internal revenue laws and grants them the necessary powers for this task, including the power to "execute and serve search warrants." In marked contrast, section 7602 does not mention the criminal tax laws and does not provide for "search warrants."

[8] *United States* v. *Powell*, 379 U.S. 48 (1964), frequently cited as bearing on the issue involved here, was concerned neither with the construction of section 7602 nor with the question whether it is improper to use Internal Revenue summonses to investigate crime.

The contention that section 7602 authorizes only civil investigations seems unavoidable in light of the principles that have guided this Court in interpreting similar statutory grants of power. The Court has recognized that the subpoena power is "capable of oppressive use," *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 363 (1942), and has construed doubtful grants of investigative authority in favor of private parties, *Cudahy Packing Co.* v. *Holland*, *supra*, especially when criminal or quasi-criminal liability is potentially involved. *Jones* v. *SEC*, 298 U.S. 1 (1936); *United States* v. *Minker*, 350 U.S. 179 (1956).

These principles are fully applicable to Internal Revenue Service summonses. As Judge Wyzanski declared in *United States* v. *O'Connor*, 118 F. Supp. 248, 250-251 (D. Mass. 1953):

> So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases ....
>
> To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 [1939 Code predecessor of § 7602] was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers.

See also *Application of Myers*, 202 F. Supp. 212 (E.D. Pa. 1962); *United States* v. *Caplan*, 255 F. Supp. 805 (E.D. Mich. 1966).

Further, it is a familiar rule of this Court that, whenever there are alternative interpretations of a statute,

and one of those alternatives would raise serious doubts as to the constitutionality of the statute, the interpretation which avoids the constitutional issue will prevail. See *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). As the next section of this petition demonstrates, serious Fourth Amendment questions are raised by any construction of section 7602 under which Internal Revenue summonses could be used for the sole or principal purpose of investigating crime.[9]

The Government cannot justify a reading of section 7602 which is at odds with the wording of the statute, with this Court's dictum in *Reisman*, and with established principles of statutory construction.[10] The Government's argument, in fact, is one of indirection, for its conclusion that section 7602 may be used for *criminal* purposes is derived from the unexceptionable fact

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[9] See pp. 17-22 *infra*.

[10] Legislative history does not help the Government. In its brief on the merits in *Donaldson* v. *United States*, No. 65, October Term, 1970, pp. 29-35, the Government maintains that section 3615(a)-(c) of the 1939 Code contained an authorization to conduct criminal investigations and that that section was carried forward into section 7602. But none of the wording of section 3615 appears in section 7602, and the Government's position seems to depend entirely on Table II to the 1954 Code. The table does link the two sections, but Congress prefaced the table with this statement:

> The following tables have been prepared as *aids in comparing* provisions of the Internal Revenue Code of 1954 with provisions of the Internal Revenue Code of 1939. *No inference, implication, or presumption of legislative construction or intent shall be drawn or made by reason of such tables.* [Emphasis supplied.]

Internal Revenue Code of 1954, United States Code and Administrative News, p. 1013, 68A Stat. 931.

that section 7602 is aimed at investigations to ascertain *civil* tax liabilities. The Government urges that, because the existence of a tax deficiency is a necessary element of a criminal case, it follows that determination of tax liability is an essential "purpose" of every criminal tax investigation. On the Government's analysis, every criminal investigation has a purpose specified by the statute and may therefore be conducted by use of section 7602 summonses.

The basic fallacy in the Government's argument lies in its disingenuous use of "purpose," the key term in section 7602. To speak of purposes is to speak of ends and aims, and Congress carefully worded section 7602 so that the propriety of an investigation had to be determined by the "purpose"—the reason—for which it was undertaken. It is true that there can generally be no criminal tax case unless there is some tax owing. When a Special Agent investigates a particular taxpayer, however, his ultimate aim is to discover and prove criminal conduct. To argue that all the steps necessary to achieve this aim qualify as "purposes" is to trivialize the term and to confuse means and ends.[11] Such reasoning leads ultimately to the interesting position that there should be no enforcement of section 7602 summonses whose sole purpose is criminal, but that no such summonses exist.

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[11] A similar point was made by the District Court in the instant case. See n. 3 *supra*. *Cf. Jones* v. *SEC*, 298 U.S. 1, 25-26 (1936):

> An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer.

Furthermore, the Government recognizes that at some point prior to the commencement of a criminal trial, a section 7602 summons may not be used. It has conceded, in this Court and elsewhere, that such a summons is improper once an indictment issues. Brief for the Government at 36, *Donaldson* v. *United States*, No. 65, October Term, 1970; *United States* v. *White*, 309 F. Supp. 508, 509 (W.D. Pa. 1970). The Government has been led to admit at least this much by a string of cases, beginning with *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass. 1953), and exemplified by the decision below, which clearly establish that section 7602 summonses may not be used once a criminal case is "actually pending against the taxpayer."[12] The need to establish civil tax liability in order to make out a criminal case, however, does not cease with the issuance of an indictment. It is flatly inconsistent to contend that the civil aspects of a criminal investigation justify it prior to indictment, but not thereafter.

Even in the case of an investigation actually having both civil and criminal purposes, an incidental civil purpose cannot justify using section 7602 summonses to conduct investigations which are principally criminal in nature. Once the spotlight of suspicion has focused on a taxpayer and the predominant purpose of the Government has become the discovery and proof of criminal conduct, it should no longer be permissible

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[12] *Howfield, Inc.* v. *United States*, 409 F.2d 94, 697 (9th Cir. 1969). See, *e.g.*, *Venn* v. *United States*, 400 F.2d 207 (5th Cir. 1968); *McGarry* v. *Riley*, 363 F.2d 421 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966); *Tillotson* v. *Boughner*, 333 F.2d 515 (7th Cir.), *cert. denied*, 379 U.S. 913 (1964); *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12 (2d Cir. 1962), *cert. denied*, 373 U.S. 902 (1963); *United States* v. *Merrell*, 303 F. Supp. 490 (N.D.N.Y. 1969).

to use investigative powers intended for civil investigations.

The Government would avoid this conclusion by insisting that the civil and criminal activities of the Internal Revenue Service cannot be separated or meaningfully weighed.[13] In fact, the very structure and organization of the Service reflect a total segregation of civil and criminal tax work.

The Audit Division of the Service is charged with the determination of civil liability.[14] A Revenue Agent working for this Division is required, "whenever and as soon as he finds 'definite indications of fraud or criminal potential,' to refer a case to the Intelligence Division for investigation by a different agent who works regularly on criminal matters."[15] These "different agents" are given the designation "Special Agent" and are specifically trained to uncover all evidence needed to prove a crime and to document a case for presentation in court. They are authorized by section 7608 to execute and serve search and arrest warrants and to make arrests without a warrant. Special Agents are, in fact, policemen in business suits, criminal investigators whose domain is the detection of criminal tax violations, not the determination of civil tax liabilities. In fact, while a Special Agent is conducting a

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[13] Brief for the Government at 25-29, *Donaldson* v. *United States*, No. 65, October Term, 1970.

[14] Internal Revenue Service Statement of Organization and Functions, § 1113.53, 35 Fed. Reg. 2417, 2422 (1970).

[15] *Mathis* v. *United States*, 391 U.S. 1, 6 n. 2 (1968) (White, J., dissenting). The functions of the Intelligence Division are set forth in the Internal Revenue Service Statement of Organization and Functions, § 1118.6, 35 Fed. Reg. 2417, 2454 (1970), and reproduced in the opinion of the District Court below at App. 12a.

criminal investigation, the Service will normally take no steps toward assessment or collection of the civil liability.[16]

Thus, the Revenue Service itself clearly demarks the criminal from the civil. As District Judge Real noted below (App. 13a), the question whether an investigation is predominantly civil or criminal can be answered in most cases by simply ascertaining whether it is being conducted by a Revenue Agent or a Special Agent.

In sum, there is ample authority for the proposition that section 7602 is a civil statute which cannot be read to authorize summonses whose predominant purpose is the investigation of crime. The Court should grant certiorari in this case to review the erroneous interpretation of the statute made by the court below.

3. The Decision Below Deprives Taxpayers of Their Fourth Amendment Rights

In this case section 7602 summonses were issued and enforced despite a finding that the purpose of the investigation was "to determine whether or not [petitioners] are criminally liable for violations of the tax laws of the United States." (App. 14a.) Petitioners submit that this practice is wholly incompatible with the requirements of the Constitution.

Under the Fourth Amendment, a criminal search warrant requires the prior approval of an independent magistrate and may not issue except upon satisfactory

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[16] Lipton, *Constitutional Rights in Criminal Tax Investigations*, 45 F.R.D. 323, 332 (1968). See also the Policy Manual of the Internal Revenue Service, as quoted in *United States* v. *Jaskiewicz*, 278 F. Supp. 525, 536-537 (E.D. Pa. 1968).

proof of probable cause to search.[17] A long line of Supreme Court decisions has established the rule that, except in certain extraordinary situations when probable cause exists and when securing a warrant would be impracticable, a search undertaken without a valid warrant in the course of a criminal investigation is *per se* unreasonable under the Fourth Amendment.[18] This rule applies as fully at the investigatory stage as it does after the return of an indictment,[19] and the burden is on the Government to show the need for exemption.[20] None of the recognized exceptions to the rule is applicable to the present case.[21]

Internal Revenue summonses are not equivalent to criminal search warrants required by the Fourth

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[17] The requirement of "probable cause" to search for evidence of crime has been refined in the course of many decisions. See *Spinelli* v. *United States*, 393 U.S. 410 (1969); *McCray* v. *Illinois*, 386 U.S. 300 (1967); *United States* v. *Ventresca*, 380 U.S. 102 (1965); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Draper* v. *United States*, 358 U.S. 307 (1959).

[18] See, *e.g.*, *Chimel* v. *California*, 395 U.S. 752, 762 (1969); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968); *Katz* v. *United States*, 389 U.S. 347, 356-57 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 528-29 (1967); *Stoner* v. *California*, 376 U.S. 483, 486-87 (1964); *Chapman* v. *United States*, 365 U.S. 610, 615-17 (1961); *Rios* v. *United States*, 364 U.S. 253, 261-62 (1960); *Jones* v. *United States*, 357 U.S. 493, 497-99 (1958); *McDonald* v. *United States*, 335 U.S. 451, 454-56 (1948).

[19] *Davis* v. *Mississippi*, 394 U.S. 721, 726 (1969); *Terry* v. *Ohio*, 392 U.S. 1 (1968).

[20] *Chimel* v. *California*, 395 U.S. 752, 762 (1969); *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951).

[21] Compare *Carroll* v. *United States*, 267 U.S. 132 (1925) and *Brinegar* v. *United States*, 338 U.S. 160 (1949) (searches of vehicles); *Warden* v. *Hayden*, 387 U.S. 294 (1967) (hot pursuit of suspect); *Chimel* v. *California*, 395 U.S. 752 (1969) (search incident to lawful arrest).

Amendment. Section 7602 summonses are issued by the investigating agent, "the officer engaged in the often competitive enterprise of ferreting out crime," rather than a "neutral and detached magistrate." *Mancusi* v. *DeForte*, 392 U.S. 364, 371 (1968), quoting from *Johnson* v. *United States*, 333 U.S. 10 (1948). Although a summons issued pursuant to section 7602 is not enforceable without the independent order of a court, this Court recognized long ago that:[22]

> [T]he subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation.

Even if the summoned person is sufficiently knowledgeable to insist upon court enforcement, it has generally been assumed that a showing of probable cause is not a prerequisite to enforcement of a section 7602 summons. See *United States* v. *Powell*, 379 U.S. 48 (1964). In short, requirements for the issuance and enforcement of Internal Revenue summonses clearly fail to meet Fourth Amendment standards for investigations conducted to discover or prove criminal conduct.[23]

There is no reason for placing criminal tax investigations on a different footing under the Fourth Amendment than the investigation of other crimes. Special

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[22] *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 363-64 (1942).

[23] The constitutional issue in this case is not resolved by *United States* v. *Powell*, 379 U.S. 48 (1964), or by the one-line, *per curiam* affirmance in *Justice* v. *United States*, 390 U.S. 199 (1968), *aff'g United States* v. *First Nat'l Bank of Pikeville*, 274 F. Supp. 283

Agents have adequate means for conducting criminal investigations independent of section 7602.[24] And the legitimate need of the Internal Revenue Service to conduct civil investigations would not be frustrated by forbidding the use of section 7602 for criminal investigations. Requiring the Service to employ different procedures for conducting civil and criminal investigations would comport with the Court's declaration in *Abel* v. *United States*, 362 U.S. 217, 226 (1960), that:

> The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.

Finally, this Court's decisions in *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *City of*

(E.D. Ky. 1967). *Powell* did not involve any constitutional issues. *Justice* involved an attack on the validity of section 7604 on its face, not the practice of using section 7602 to conduct criminal investigations. The three-judge District Court credited the testimony of a Special Agent that his investigation had the proper civil purpose of determining the accuracy of the income tax returns of the taxpayers. 274 F. Supp. at 284. See pp. 14-15 *supra*. Also, the intervening taxpayer in *Justice* lacked standing to make Fourth Amendment claims on behalf of the party against whom the summons had issued. See *United States* v. *Mercurio*, 418 F.2d 1213 (5th Cir. 1969), *cert. granted sub nom. Donaldson* v. *United States*, No. 65, October Term, 1970.

[24] Section 7608(b) specifically authorizes Special Agents to execute and serve search warrants. *United States* v. *Premises, 801 North Seventh Street*, 70-1 USTC ¶ 9412 (S.D. Ill. 1970), is an example of the use of such authority. In addition, grand juries have traditionally been regarded as an "appropriate constitutional medium for the preliminary investigation of crime." *Jones* v. *SEC*, 298 U.S. 1, 27 (1936).

Seattle, 387 U.S. 541 (1967), conclusively establish that the Internal Revenue Service must fulfill the requirements of the Fourth Amendment when conducting any search, and with the most stringent requirements when conducting criminal investigative searches. 387 U.S. at 535, 539. Those decisions make it clear that the Amendment must be complied with even when a governmental agency conducts an administrative search which is *not* "personal in nature" or "aimed at the discovery of evidence of crime." 387 U.S. at 537. Significantly, the Court decided that constructive searches by means of orders to produce are equivalent to actual searches. *Id.* at 545. What is most important for the present case, however, is that the *Camara* and *See* decisions reaffirmed the "time-honored doctrines applicable to criminal investigations," *id.* at 539, including the requirement that such investigations proceed under a search warrant obtained from an independent magistrate upon a showing of probable cause.[25]

There are various alternatives for drawing the line between the constitutionally permissible civil uses of Internal Revenue summonses and their illegitimate use for criminal investigations. The Court's decision in *Abel* indicates that the test of impropriety is whether "the decision to proceed administratively . . . was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." 362

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[25] In *See*, the Court approved *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), and *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), cases dealing with the requirements for administrative warrants. 387 U.S. at 544-46. Those cases does not control searches of particular taxpayers for evidence of crime.

U.S. at 230. Alternatively, a criminal search warrant could be required as of the moment that the Intelligence Division and its Special Agents enter a case.[26] Or, the proper test might be whether the investigation has assumed "dominant criminal overtones."[27]

Regardless of how the line is ultimately drawn, petitioners submit that this Court should grant certiorari in this case to consider the question whether the law that has developed in the circuits authorizing the use of Internal Revenue summonses to investigate crime is consistent with the controlling principles of the Fourth Amendment.

4. The Issue in This Case Has Produced Conflicting Rules and Burdened Tax Administration

In *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964), this Court stated clearly that a section 7602 summons may not be used "for the improper purpose of obtaining evidence for use in a criminal prosecution." This statement has led taxpayers to believe that there is serious ground for controversy when the Service attempts to use its powers under section 7602 to investigate crime.[28] The result has been a massive amount of

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[26] *Cf. United States* v. *Dickerson*, 413 F. 2d 1111 (7th Cir. 1969), and *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill. 1967), where the Seventh Circuit ruled that *Miranda* warnings are required at this point. See also *United States* v. *Carlson*, 260 F. Supp. 423, 429 (E.D.N.Y. 1966).

[27] *Cf. Stuart* v. *United States*, 416 F.2d 459, 462 (5th Cir. 1969); *United States* v. *Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969).

[28] Taxpayers have probably also been encouraged to litigate the improper purpose issue by the Court's decisions establishing stringent Fourth Amendment standards for criminal investigations. See cases cited nn. 17 & 18 *supra*.

litigation which the Government has found intolerable.[29]

While taxpayers have persisted in litigating the improper purpose issue, the Government has maintained that the *Reisman* dictum is not dispositive because the Court supported its statement by citing *Boren* v. *Tucker*, 239 F.2d 767, 772-73 (9th Cir. 1956). *Boren* was a vague decision apparently upholding the use of an Internal Revenue summons for precisely that "improper purpose" condemned in the *Reisman* dictum. The Government, relying on *Boren*, has succeeded in persuading most courts to rule in its favor.

Although there is no court of appeals decision refusing enforcement of a section 7602 summons, the circuits have developed views on the question of using such summonses to investigate crime which are both inconsistent and confusing. Some, like the Ninth Circuit below, have adopted the "criminal prosecution *in esse*" rule—that use of section 7602 summonses to investigate crime is proper unless a criminal case is "actually pending against the taxpayer." (App. 18a.)[30] Other courts of appeals, taking a different approach, have

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[29] In his response to the petition for certiorari, the Solicitor General points out that it has become necessary "in almost every Internal Revenue summons enforcement proceeding" to argue and litigate the question whether a section 7602 summons may be used to investigate crime. Memorandum for the United States at 6, *Donaldson* v. *United States*, No. 65, October Term, 1970.

[30] See, *e.g.*, *Venn* v. *United States*, 400 F.2d 207 (5th Cir. 1968); *McGarry* v. *Riley*, 363 F.2d 421 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966); *Tillotson* v. *Boughner*, 333 F.2d 515 (7th Cir.), *cert. denied*, 379 U.S. 913 (1964); *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12 (2d Cir. 1962), *cert. denied*, 373 U.S. 902 (1963).

adopted what may be called the "solely criminal purpose" rule—that an Internal Revenue summons may be used when the investigation has mixed civil and criminal purposes, but not when the sole purpose of the investigation is to build a criminal prosecution.

Under the "solely criminal purpose" rule, section 7602 summonses issued for the sole purpose of investigating crime are improper even prior to indictment. If this rule—which has apparently been adopted in the Third, Fifth, and Sixth Circuits—had been applied in the instant case, petitioners would have prevailed.

Thus, the Third Circuit recently indicated that it is prepared to hold a summons improper even when there is no criminal prosecution.[31] To the same effect is the recent Fifth Circuit decision in *United States* v. *Roundtree*, 420 F.2d 845 (1969).[32] And the Sixth Circuit has formulated its position in two different ways, both of which would have permitted petitioners to prevail in the instant case.[33]

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[31] In a footnote in *United States* v. *DeGrosa*, 405 F.2d 926 (3rd Cir.), *cert. denied*, 394 U.S. 973 (1969), the Court of Appeals expressed disapproval of *Wright* v. *Detwiler*, 241 F. Supp. 753 (W.D. Pa. 1964), *aff'd per curiam*, 345 F.2d 1012 (3rd Cir. 1965), because that case might be "read as permitting the use of a § 7602 summons in aid of an investigation solely criminal . . . ." 405 F.2d at 928 n. 5. Yet in *Wright* there was no existing criminal prosecution when the section 7602 summons issued.

[32] Although there was no criminal case pending when the section 7602 summons issued in *Roundtree*, the Court of Appeals remanded for the specific purpose of according taxpayer an opportunity to show that the "sole purpose of the summons was criminal prosecution." 420 F.2d at 851.

[33] In *Hinchcliff* v. *Clarke*, 371 F.2d 697, *cert. denied*, 387 U.S. 941 (1967), the Court of Appeals upheld enforcement of an Internal Revenue summons against constitutional challenge only after

There are other circuits besides the Sixth which have been unable to decide upon a single rule,[34] and this, together with the conflicting views in the circuits, have been major reasons for the widespread confusion which has arisen with respect to the question whether Internal Revenue summonses can be used to investigate crime. Another factor has been the failure of the courts to distinguish between statutory and constitutional attacks on Internal Revenue summonses.[35] Additionally, courts advancing the "solely criminal

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the Service represented "that its investigation has *no purpose* of possible criminal prosecution." (Emphasis supplied.) 371 F.2d at 701. The subsequent decision in *DiPiazza* v. *United States*, 415 F.2d 99 (6th Cir. 1969), *petition for certiorari pending*, No. 67, October Term, 1970, which did not mention *Hinchcliff* and which did not involve the constitutional aspects of the issue, held that a section 7602 summons may properly be used "[w]here the investigation may produce both civil and criminal evidence." *Id.* at 103. At the same time, the *DiPiazza* court distinguished and reaffirmed the District Court decision in *United States* v. *Caplan*, 255 F. Supp. 805 (E.D. Mich. 1966), in which use of an Internal Revenue summons was ruled improper, despite the fact that there was no existing criminal prosecution, because "the IRS summons was issued to investigate possible criminal violations and not to determine civil liability." *Id.* at 103.

[34] *Compare McGarry* v. *Riley*, 363 F.2d 421 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966), *with Lash* v. *Nighosian*, 273 F.2d 185 (1st Cir. 1959), *cert. denied*, 362 U.S. 904 (1960). Also *compare United States* v. *Roundtree*, 420 F.2d 845 (5th Cir. 1969), *with Venn* v. *United States*, 400 F.2d 207 (5th Cir. 1968).

[35] *E.g.*, *Wild* v. *United States*, 362 F.2d 206, 209 (9th Cir. 1966). Nor have the courts of appeals consistently distinguished between taxpayer objections to summonses served on third parties and objections to summonses served on the taxpayer himself, *e.g.*, *United States* v. *First Nat'l Bank of Pikeville*, 274 F. Supp. 283 (E.D. Ky. 1968), *aff'd sub nom. Justice* v. *United States*, 390 U.S. 199 (1968), or between taxpayer objections and the objections of third parties, *e.g.*, *United States* v. *Michigan Bell Tel. Co.*, 415 F.2d 1284 (6th Cir. 1969).

purpose" rule have articulated it in a variety of ways.[36] Many opinions espousing this rule seem only to say that every criminal investigation is justified by section 7602 because showing civil tax liability is an element of a criminal prosecution.[37] The confusion engendered by this position is well illustrated by District Judge Dumbauld's plaintive query in *United States* v. *White*, 309 F. Supp. 508, 509 (W.D. Pa. 1970):

> If every investigation has both civil and criminal aspects and objectives, how can any meaning be given to the dichotomy of civil and criminal objectives recognized by the Court of Appeals decision in United States v. DeGrosa, 405 F.2d 926, 928 (C.A. 3, 1969)? When can there ever be a criminal case which is solely criminal, which is not also civil, and how can any effect be given in practice to the distinction which the law recognizes in theory?[38]

To summarize, the issue presented by this case has promoted a tide of litigation and produced conflict and confusion among the courts. The proper administration of the tax laws has been impeded, and taxpayers are uncertain of their rights. Only a decision of this Court can clarify the law.[39]

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[36] The "solely criminal purpose" rule is sometimes stated in terms of "[negativing] the existence of a proper civil purpose," *United States* v. *DeGrosa*, 405 F.2d 926, 928 (3rd Cir. 1969), or proving that the Government did not have "the purpose of determining the correct income tax liability" of the taxpayer. *United States* v. *Giordano*, 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 90 S. Ct. 1355 (1970).

[37] This is the Government's argument, which is analyzed above at pp. 13-15.

[38] District Judge Real expressed similar views in the instant case. (App. 15a.)

[39] As the discussion at pp. 8-10 *supra* makes clear, a decision by the Court in *Donaldson* v. *United States*, No. 65, October Term, 1970, will not adequately resolve the issue presented.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America and Charles H. Moriyama, Special Agent of the Internal Revenue Service, Petitioners,

v.

M. P. RUGGIERO, as Vice President Finance & Administration of Jordanos' Inc. and Jordanos' Inc., Respondents.

UNITED STATES of America and Charles H. Moriyama, Special Agent of the Internal Revenue Service, Petitioners,

v.

John L. JORDANO, Jr., as President of Pacific Beverages Company and Pacific Beverages Company, Respondents.

UNITED STATES of America and Charles H. Moriyama, Special Agent of the Internal Revenue Service, Petitioners,

v.

John L. JORDANO, Jr., as President of Chef's Vendors, Inc. and Chef's Vendors, Inc., Respondents.

UNITED STATES of America and Charles H. Moriyama, Special Agent of the Internal Revenue Service, Petitioners,

v.

James D. JORDANO, as Vice President of Jantro Investment Company, and Jantro Investment Company, Respondents.

UNITED STATES of America and Charles H. Moriyama, Special Agent of the Internal Revenue Service, Petitioners,

v.

John L. JORDANO, Jr., as President of Jorland, Inc., and Jorland, Inc., Respondents.

UNITED STATES of America and Charles H. Moriyama, Special Agent of the Internal Revenue Service, Petitioners,

v.

John L. JORDANO, Jr., as President of Jorlease, Inc., and Jorlease, Inc., Respondents.

Nos. 69-42-69-47.

United States District Court
C. D. California.

May 7, 1969.

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Memorandum of Decision

REAL, District Judge.

These cases come before the Court on six separate petitions to enforce Internal Revenue summonses. An order to show cause was issued by the Court requiring respondents, M. P. Ruggeiro as Vice President Finance & Administration of Jordanos' Inc. and Jordanos' Inc., John L. Jordano, Jr. as President of Pacific Beverage Company (hereinafter called Pacific), John L. Jordano, Jr. as president of Chef's Vendors, Inc. (hereinafter called Chef's), James D. Jordano, as Vice President of Jantro Investment Company and Jantro Investment Company, John L. Jordano, Jr. as President of Jorland, Inc. and Jorland, Inc. (hereinafter called Jorland), John L. Jordano, Jr., as President of Jorlease, Inc., and Jorlease, Inc. (hereinafter called Jorlease), to show cause why they should not be compelled to testify and produce records demanded in the Internal Revenue summonses, served upon each respondent respectively.

Since each of the respondents have mutual interests and raise the same issues of law and fact, all are considered together.

Each of the summonses involved herein was issued by petitioner Charles H. Moriyama in his capacity as a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the office of the District Director in Los Angeles, California.

Separate answers have been filed by each of the respondents. In each of the answers there are admissions of the summonses and denials that they are legally enforceable.

Alleging affirmative defenses the respondents contend:

1. Petitioners' failure, after request, to acknowledge in writing that the investigation is not for criminal purposes manifests the illegality of the process in violation of the Fourth, Fifth and Sixth Amendments of the Constitution of the United States.

2. Section 7602 of the Internal Revenue Code of 1954, as amended, is violative of the Fourth, Fifth and Sixth Amendments of the Constitution of the United States.

3. Government agents were guilty of fraud and deceit by misrepresenting the scope of their investigation as not necessarily a criminal tax investigation.

4. Use of the summons is a subterfuge, the true purpose being a criminal investigation constituting an unlawful search and seizure, a denial of due process of law, and a denial of the effective assistance of counsel.

5. The summons is too broad in scope and too vague and indefinite constituting a "fishing expedition" into all of respondents' records, books, files and pieces of paper of every kind and description.

Respondent M. P. Ruggeiro as Vice President, Finance & Administration of Jordanos' Inc. and Jordanos' Inc. (hereinafter referred to as Jordanos'), further contend by way of affirmative defense:

1. The correctness of Jordanos' income tax returns for the fiscal years ending June 30, 1962, to June 30, 1965, inclusive, has been determined. The summons procedure of section 7602 of the Internal Revenue Code of 1954, as amended, does not authorize issuance of a summons in such a situation.

Respondent James D. Jordano as Vice President of Jantro Investment Company and Jantro Investment Company

(hereinafter referred to an Jantro), interposes the additional affirmative defense:

> 1. The correctness of Jantro's income tax returns for the fiscal year ending September 30, 1965, has been determined. The summons procedure of section 7602 is therefore inapplicable.

BACKGROUND

Samuel Charles Harris, an Internal Revenue Agent in the Audit Division, assigned to the Santa Barbara office of the Internal Revenue Service, performed an audit of the federal corporate income tax returns of Jordano for the fiscal years ending June 30, 1962, June 30, 1963, June 30, 1964, and June 30, 1965. He also performed an audit of the federal corporate income tax returns of Jantro for the fiscal year ending September 30, 1965. These audits began in December, 1965.

In connection with the audits of Jordano and Jantro, Mr. Harris examined the minute books, general ledgers, general journals, disbursements journals, sales journals, voucher register and purchase journals.

On February 6, 1967, Mr. Harris procured the execution of a Form 870,[1] Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment.

Sometime during 1967, George Franklin Regan, a Special Agent employed in the Intelligence Division of the office of the District Director, Los Angeles, California, re-

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[1] Internal Revenue Code of 1954 Section 7121 provides for closing agreements to determine final and conclusive tax liability in the absence of fraud or malfeasance, or misrepresentation of a material fact. Form 870 is only a consent by the taxpayer which expedites the adjustment of tax liability. It is not a closing agreement within the meaning of section 7121.

ceived information of possible unreported income of Jordano for years that had already been audited.

At the time of the receipt of this information Orrell Davis, a Revenue Agent in the Audit Division, assigned to the Santa Barbara office, was conducting an audit of Jordano for the fiscal year ending June 30, 1966.

Special Agent Regan inquired of Revenue Agents Harris and Davis concerning the scope of the audit of Jordano and discovered that these income items had not been audited.

Upon the information received, Special Agent Regan submitted an information report through channels.

On February 29, 1968, Special Agents Moriyama and Regan were assigned to a preliminary investigation of Jordano. The source of the then unnumbered preliminary case was within the Intelligence Division of the Internal Revenue Service.

On April 3, 1968, pursuant to the request of Special Agent Moriyama, there was issued by Homer O. Croasmun, Regional Commissioner, Internal Revenue Service, Treasury Department, a notice of re-examination (Form L-153) to respondent Jordano for fiscal years ending June 30, 1962 through June 30, 1965.

On June 4, 1968, Special Agent Moriyama issued and served upon Jordano a summons requiring appearance with all corporate records for the fiscal years ending June 30, 1963 through June 30, 1967.

On June 26, 1968, the tax investigation involving Jordano was changed from an unnumbered-preliminary to a numbered tax case with the continued assignment of Special Agents Moriyama and Regan.

Simultaneously, Special Agents Moriyama and Regan were assigned to unnumbered-preliminary investigation of respondents Jantro, Jorland, Jorlease, Chef's and Pacific.

On June 27, 1968, Special Agent Moriyama issued and served a summons to each of respondents, requiring appearance with all corporate records as follows:

Jorlease—fiscal years ending June 30, 1963, through June 30, 1967,

Jorland—years 1963 through 1966,

Chef's—fiscal years ending June 30, 1963, through June 30, 1967,

Pacific—fiscal years ending June 30, 1963, through June 30, 1967.

On July 15, 1968, pursuant to the request of Special Agent Moriyama, there was issued by Homer O. Croasmun, Regional Commissioner, Internal Revenue Service, Treasury Department, a notice of re-examination (Form L-153) to respondent Jantro for the taxable year 1965.

On August 2, 1968, Special Agent Moriyama issued and served a summons to respondent Jantro requiring appearance with all corporate records for fiscal years ending September 30, 1963 through September 30, 1967.

Each of the summonses issued was met with the same response by counsel for respondents—if the Internal Revenue Service would assure respondents that none of the evidence discovered, as the result of these records, would be used in a criminal prosecution of respondents or its officers, they would comply.

THE ORDERS TO SHOW CAUSE

Respondents have raised some questions of the propriety of proceedings by orders to show cause which will essentially determine all of the issues of the petitions on file herein.

Petitioners' proceedings are brought pursuant to the provisions of Title 26 §§7402(b) and 7604(a).

Title 26 U.S.C. § 7402(b) provides:

> "§ 7402. *Jurisdiction of district courts.*
>
> • • • • • • • • • •
>
> (b) To enforce summons.—If any person is summoned under the internal revenue laws to appear to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Title 26 U.S.C. § 7604(a) provides:

> "§ 7604. *Enforcement of Summons.*
>
> (a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

We are not here concerned with a choice of procedure. Both sections 7402(b) and 7604(a) provides that enforcement shall be "by appropriate process." We are, by the nature of the attack presented by respondents, required to

appraise and decide whether an order to show cause would provide for all of the relief requested in the petitions.[2] The Court is of the opinion that the nature of the relief provided in both sections 7402(b) and 7604(a) requires summary disposition.

Respondents herein maintain that the case of United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964), buttressing Reisman v. Caplin, 375 U.S. 440, 449, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964), relegates summons enforcement actions to the requirements of the Federal Rules of Civil Procedure including discovery, pretrial and trial of the issues presented by the hearing. More particularly, respondents point to footnote 18 of the Powell case, *supra*.

> "18. Because § 7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, Martin v. Chandis Securities Co., 9 Cir., 128 F.2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. If the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction, application for the sanctions available under § 7604(b) might be made simultaneously with the filing of the complaint."

Unfortunately, the Supreme Court leaves more unsaid than it says in footnote 18. Certainly civil proceedings can only be instituted in this Court by the filing of a complaint. Fed.R.Civ.P. 3. The Supreme Court without providing a *procedure* then says, "followed by answer and hearing." This language falls far short of requiring a panoply of discovery and pretrial incident to the normal

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[2] Whether the government's pleading is denominated a petition or complaint is immaterial. Either is filed pursuant to the requirement of Federal Rules of Civil Procedure Rule 2, Rule 3 and Rule 8(a).

civil action. It would appear that the "appropriate process" required by sections 7402(b) and 7604(a) is met when the taxpayer is afforded an "adversary hearing." United States v. Powell, *supra*.

In Wild v. United States, 362 F.2d 206, 9th Cir. 1966, the Court of Appeals for the Ninth Circuit in deciding the validity of an enforcement proceeding, if not directly, did indirectly consider and approve the procedure used by the Government here. In the Wild case, *supra*, the Court says, at page 209:

> "• • • Wild points out that appellees did not file a complaint, but a petition, and obtained an order to show cause."

The Court of Appeals answers:

> "• • • Appellants had all the procedural rights they were entitled to under the Federal Rules of Civil Procedure, including an opportunity to answer, which they did, and a hearing. No prejudice has been claimed or shown."

Cf. Howfield, Inc. v. United States of America, 409 F.2d 694, 9th Cir., decided March 19, 1969.

To hold otherwise would subject examination of books and witnesses in determining the liability of a person for a tax to unjustified and interminable delays, thereby nullifying the clearly expressed purpose of Title 26, U.S.C. § 7602.

VAGUENESS AND INDEFINITENESS OF SUMMONSES

Each of the summonses, herein, specifies that records "relating to the financial and business transactions" of each of respondents for certain tax years under investigation are required. No clarification is necessary.

OPPRESSIVENESS OF SUMMONSES

Although evidence was elicited as to the necessity of transportation of the records of respondent Jordano, by six or seven truckloads, it does not make that summons oppressive in light of the offer of the Government to go to the place where the records are stored to obtain compliance.

The testimony concerning the records is somewhat unclear. We are here concerned with six separate summonses calling for records of six corporate entities. No testimony was elicited concerning the volume of records for each entity. The volume appears to be applicable only to the records of respondent Jordano and not the other respondents. As previously stated, the offer of the Government obviates any objection of oppressiveness.

COMPLIANCE WITH THE REQUIREMENTS OF 26 U.S.C. § 7605(b)

Title 26 U.S.C. § 7605(b) provides:

> "§ 7605. *Time and place of examination.*
>
> (a) * * *
>
> (b) Restrictions on examination of taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

The application of the principles and reasoning of section 7605(b) to the present case requires consideration of two circumstances—1. Production of the records of respondent Jordano for the fiscal years ending June 30, 1963 through June 30, 1965, and 2. Production of the records of respondent Jantro for the taxable year 1965.

The Supreme Court in United States v. Powell, *supra*, in considering section 7605(b) lays to rest any contention of respondents Jordano and Jantro when it says, 379 U.S. at page 55, 85 S. Ct. at p. 254:

> "Congress recognized a need for a curb on the investigating powers of low echelon revenue agents, and considered that it met this need simply and fully by requiring such agents to clear any repetitive examination with a superior. For us to import a probable cause standard to be enforced by the courts would substantially overshoot the goal which the legislators sought to attain. There is no intimation in the legislative history that Congress intended the courts to oversee the Commissioner's determinations to investigate."

ENFORCEMENT OF SUMMONS ISSUED BY A SPECIAL AGENT, INTELLIGENCE DIVISION, INTERNAL REVENUE SERVICE

The enforcement proceeding herein now resolves itself to the issue of whether or not a special agent, Intelligence Division, Internal Revenue Service, can issue summonses in the performance of his duties.

Title 26 U.S.C. §7602 provides in its pertinent part:

> "§ 7602. *Examination of books and witnesses.*
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (a) To summon the person liable for tax or required to perform the act, or any officer or employee

> of such person, or any person having possession, custody, or care of books of account * * *. [O]r any other person the Secretary or his delegate may deem proper * * *."

Petitioners herein maintain that the Commissioner need not make any showing of probable cause to obtain enforcement of his summons relying upon United States v. Powell, *supra*. Respondents, on the other hand, relying on the Powell case, *supra*, and Reisman v. Caplin, *supra*, maintain that the summons power cannot be used for the purpose of criminal investigation or prosecution. This is not a case of probable cause but rather a determination of the legitimacy of the *purpose* of the investigation.

Petitioner Moriyama is a Special Agent assigned specific duties within the Intelligence Division of the Internal Revenue Service. The function of the Intelligence Division[3] makes the conclusion inescapable that this is not the "continuing investigation" of tax liability referred to in Boren

[3] 30 Fed. Reg. 9399-9400 1967 CCH Standard Federal Tax Reporter, Vol. 6 § 5988 provides:

> "1118.6 *Intelligence Division.* The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics, and certain firearms) by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases."

v. Tucker, 239 F.2d 767, 9th Cir. 1956. Nor is it the situation present in the decided cases upon which petitioners rely, where criminal liability may be a possible result of the determination of tax liability? We are faced with an investigation where tax liability is to be determined only as a necessity to a prosecutable criminal case. The transparency of petitioners' assertion that their purpose in the investigation of respondents was "of ascertaining the correctness of corporate income tax returns" is apparent. For, as petitioners can claim, a civil tax investigation *may* result in criminal charges validating issuance of a summons; viewing the obverse of the same coin, a criminal investigation may—and most likely will—result in the imposition of civil tax liability including a 50% fraud penalty.

The status of an agent—revenue or special—then becomes important. Certainly not decisive of *the purpose* of an investigation—but as relevant and material evidence of *the purpose* of the investigation which would use the sensitive tool of issuance of a summons without judicial vigilance of its uses or abuses.

Revenue agents of the Internal Revenue Service are auditors charged with the responsibility of determining correct tax liability. The results of their efforts costs an errant taxpayer money. Special agents are criminal investigators charged with the responsibility of investigating criminal violations of the tax laws of the United States. The results of their efforts can cost an errant taxpayer his liberty.

The area of gray is narrow but most confusing. Revenue agents do not investigate fraud, either criminal or civil. That function is left to the special agent with his expertise in investigation. Petitioners would have the Court end its inquiry with the broad assertion that section 7602 authorizes the determination of tax liabilities by *agents* of the Treasury, whatever the purpose, and whatever the ultimate outcome. The decided cases do not agree.

In Wild v. Unitd States, *supra*, the Court of Appeals for the Ninth Circuit in affirming a District Court Order enforcing a summons issued by a special agent sets forth the rule in this language 362 F.2d at page 208:

> "In order to prevail in an enforcement proceeding of this kind, one seeking enforcement must show that the investigation will be conducted pursuant to a legitimate purpose. United States v. Powell, 379 U.S. 48, 57, 85 S.Ct. 248, 13 L.Ed.2d 112. If the sole objective of an investigation is to obtain evidence for use in a criminal prosecution, the purpose is not legitimate and enforcement should be denied. See Reisman v. Caplin, 375 U.S. 440, 449, 84 S.Ct. 508, 11 L.Ed.2d 459.
>
> "If however, the objective of the investigation is to obtain information which may be utilized in determining whether there is civil liability for a tax or a tax plus penalty, then the summons may be enforced notwithstanding the fact that the information might also be used in a criminal prosecution. See Boren v. Tucker, 9 Cir., 239 F.2d 767, 772-773; Sanford v. United States, 5 Cir., 358 F.2d 685; In re Magnus, Mabee & Raynard, Inc., 2 Cir., 311 F.2d 12, 16."

The authorities uniformly make one thing clear—the power of summons given in section 7602 cannot be used for *the purpose* of criminal prosecution. United States v. Powell, *supra*, and Reisman v. Caplin, *supra*. The evidence adduced at the hearing of the order to show cause herein, by affidavit and testimony, shows that ascertaining tax liability in the instant case was only one of the steps in the investigation being conducted by petitioner MORIYAMA to determine whether or not respondents are criminally liable for violations of the tax laws of the United States. He is performing his function as a special agent in its classic sense.

To say that a summons is not being used for an improper purpose unless the existence of a proper civil purpose is absent, United States v. De Grosa, 3rd Cir. 1969, 405 F.2d 926, simply begs the question. All criminal tax investigations to be prosecutable require the "proper civil purpose" of determination of tax liability. Simply stated no tax due—no tax fraud.

Howfield, Inc. v. United States, *supra*, compels interpretation of existing case law to be that criminal purpose refers to a criminal prosecution in esse. The Court there says:

> "* * * [I]t is clear that summonses to examine taxpayer's records, obtained pursuant to 26 U.S.C. § 7602 may be used even *where their purpose is allegedly to uncover crime, when no criminal case is actually pending against the taxpayer.* Boren v. Tucker, 239 F.2d 767, 9 Cir. 1956." (emphasis ours)

Until appellate courts speak differently, this Court is compelled to grant the petitions.

The allegations of fraud and deceit are groundless and are found not true.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24,519

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

v.

M. P. RUGGEIRO, as Vice President Finance & Administration of JORDANOS' INC., and JORDANOS' INC.,
Respondents-Appellants.

No. 24,520

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, etc.,
Petitioners-Appellees,

v.

JOHN L. JORDANO, JR., as President of PACIFIC BEVERAGES COMPANY, and PACIFIC BEVERAGES COMPANY,
Respondents-Appellants.

No. 24,521

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, etc.,
Petitioners-Appellees,

v.

JOHN L. JORDANO, JR., as President of CHEF'S VENDORS, INC., and CHEF'S VENDORS, INC., *Respondents-Appellants.*

No. 24,522

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, etc.,
Petitioners-Appellees,

v.

JOHN L. JORDANO, JR., as President of JORLAND, INC., and JORLAND, INC., *Respondents-Appellants.*

No. 24,523

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, etc.,
Petitioners-Appellees,

v.

JOHN L. JORDANO, JR., as President of JORLEASE, INC., and JORLEASE, INC., *Respondents-Appellants.*

No. 25,524

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, etc.,
Petitioners-Appellees,

v.

JAMES D. JORDANO, as Vice President of JANTRO INVESTMENT COMPANY, and JANTRO INVESTMENT COMPANY,
Respondents-Appellants.

[April 28, 1970]

Appeal from the United States District Court for the Central District of California

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Before: BROWNING, DUNIWAY, and WRIGHT, Circuit Judges

PER CURIAM:

These are six consolidated appeals from orders of the district court requiring the production of corporate records specified in summonses issued by a special agent of Internal Revenue Service pursuant to 26 U.S.C. § 7602.[1]

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[1] "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or

Appellants contend that enforcement of the summonses would offend the Fourth Amendment because they were issued solely to determine if a criminal violation had occurred. In *Howfield, Inc.* v. *United States*, 409 F.2d 694, 697 (9th Cir. 1969), we stated that "summonses to examine taxpayer's records, obtained pursuant to 26 U.S.C. § 7602, may be used even where their purpose is allegedly to uncover crime, when no criminal case is actually pending against the taxpayer." *See United States* v. *Ahmanson*, 415 F.2d 785, 787 (9th Cir. 1969). *See also Wild* v. *United States*, 362 F.2d 206, 208-09 (9th Cir. 1966); *Boren* v. *Tucker*, 239 F.2d 767, 772-73 (9th Cir. 1956).

Appellants argue that the court below erred in rejecting their contention that the summonses were oppressive and too broad in scope. The district court has considerable discretion in determining these matters, *Dunn* v. *Ross*, 356 F.2d 664, 667 (5th Cir. 1966); *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12, 17 (2d Cir. 1962), and the limits of that discretion were not exceeded here. Section 7602 requires that the records be "relevant or material" to the inquiry being made, but those terms have a broader connotation in this context than in the context of trial, *United States* v. *McKay*, 372 F.2d 174, 176 (5th Cir. 1967); and although the records demanded appear to be voluminous, the Internal Revenue Service offered to inspect them at their place of storage. *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967).

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any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Appellants offer nothing specific to support their assertion that they were "severely handicapped" by the trial court's orders omitting the usual pretrial hearing and limiting discovery. We think the court acted within the discretion conferred upon it by Federal Rule of Civil Procedure 81(a)(3). *See United States* v. *Benford*, 406 F.2d 1192, 1194 (7th Cir. 1969).

Finally, certain appellants assert that the Regional Commissioner was required by 26 U.S.C. § 7605(b)[2] to make an *independent* investigation of the need for a reinspection of their books and records, and that he could not simply rely upon an investigation of need and recommendation for reinspection by the special agents, as appellants assert he did in this case. But as the Supreme Court said in *United States* v. *Powell*, 379 U.S. 48, 55 (1964), "Congress recognized a need for a curb on the investigatory powers of low-echelon revenue agents, and considered that it met this need simply and fully by requiring such agents to clear any repetitious examination with a superior."

Affirmed.

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[2] "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 448

ANDREW KYRIACO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a–19a) is reported at 425 F. 2d 1069. The opinion of the district court (Pet. App. 1a–15a) is reported at 300 F. Supp. 968.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1970 (Pet. App. 17a). The petition for a writ of certiorari was filed on July 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

033-783—70

QUESTION PRESENTED

Whether Section 7602 of the Internal Revenue Code, applied consistently with the Fourth Amendment, authorizes the use of an Internal Revenue summons in connection with an administrative investigation into the possibility of the existence of a prosecutable criminal case against a taxpayer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment and Section 7602 of the Internal Revenue Code of 1954 are set forth at pages 3–4 of the petition.

STATEMENT

The petitioners in this case are six corporations and certain of their officers. In 1967, Special Agent Regan of an Internal Revenue Service district Intelligence Division office received information of possible unreported income of Jordanos', Inc., one of the petitioners (Pet. App. 5a). At that time, the tax returns of Jordanos', Inc. for the years 1962–1965, inclusive, had been audited; its 1967 return was in the process of being audited by Revenue Agent Harris. After making some inquiries, Regan recommended that the completed audits be reopened (Pet. App. 4a–5a; II–R. 55, 254, 291–295).[1] His recommendation was followed, and

[1] "II–R." references are to the transcript in *United States v. M. P. Ruggeiro, et al.*, one of the six cases consolidated below. Following the court of appeals' decision in this case, Andrew Kyrinco, as Treasurer of Jordanos', Inc., was substituted as a party for Ruggeiro upon petitioners' motion to the court of appeals on the ground that Ruggeiro was no longer an officer of that corporation. When the government pointed out that the summonses, in addition to seeking corporate records, also sought the testimony of the named individuals, the substitution order was modified to retain Ruggeiro as a party.

the allegation of unreported income of Jordanos', Inc. was made the subject of a joint investigation by Special Agents Moriyama and Regan and Revenue Agent Davis (Pet. App. 5a–6a; II–R. 33, 292). Simultaneously, the same three agents were assigned to related investigations of the other five petitioner corporations (Pet. App. 5a). Internal Revenue summonses, signed by Special Agent Moriyama, were issued in due course to all of the petitioners, seeking the corporate records of the six corporations (Pet. App. 5a–6a). Upon the refusal of petitioners to comply with the summonses, six separate enforcement actions were initiated in the district court pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954.

In the district court proceedings, the Special Agents testified that the records sought were necessary to determine whether the corporations' tax returns were correct as filed; if upon completion of their investigation they should conclude that recommendations of criminal prosecutions were not warranted, they would make recommendations on the imposition of fraud penalties and stay with the investigation as long as necessary (II–R. 71–76, 86, 100, 254–257).

The district court enforced the summonses. While noting that in this case the tax liability of the petitioner corporations was to be determined as a "necessity to a prosecutable criminal case," the district court also pointed out that "a criminal investigation may—and most likely will—result in the imposition of civil tax liability including a 50% fraud penalty" (Pet. App. 13a). Relying on its earlier decision in *Hourfield*,

Inc. v. *United States*, 409 F. 2d 694, 697, to the effect that an Internal Revenue summons could properly be used as long as "no criminal case is actually pending against the taxpayer", the court of appeals affirmed (Pet. App. 16a–19a).

ARGUMENT

1. Although the statutory question presented here—whether an Internal Revenue summons can be used in connection with an administrative investigation into the possibility of a criminal tax prosecution—has been briefed and will be argued in *Donaldson* v. *United States*, No. 65, this Term, that is no reason for granting the present petition. The principal issue in *Donaldson*, and the one that induced the government to acquiesce in the granting of the writ there, relates to the circumstances under which a taxpayer may intervene to contest enforcement of a subpoena addressed to a third party. The "criminal purpose" issue will be reached in *Donaldson* only if that petitioner convinces this Court that the court of appeals erred in denying him intervention and, for the reasons given in our *Donaldson* brief, we believe he cannot do that.

The "criminal purpose" issue by itself does not warrant review in this Court. As petitioners acknowledge, there is no conflict among the decisions of the courts of appeals on this issue; the fact that different courts have used somewhat different rationales in upholding subpoenas creates no conflict warranting resolution here, and it will be time enough for this Court to consider the matter if a court of appeals decides in

a taxpayer's favor. Our *Donaldson* brief shows that the decisions in the lower courts are plainly correct. Indeed, since certiorari was granted in *Donaldson*, this Court has twice denied petitions for writs of certiorari seeking review of court of appeals decisions in the government's favor on the "criminal purpose" issue.[1] There is no more reason to grant this petition than those.

2. Nor does petitioners' Fourth Amendment argument—not presented in *Donaldson*—add anything to this case that warrants plenary review. The constitutional issue has been considered in the courts of appeals, and was expressly raised in the petition for a writ of certiorari that this Court denied in *Shlom* v. *United States*, *supra*, n. 2. Petitioners here simply raise again the "ghost of controversy long since settled adversely to their claim." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 196. They fail to distinguish between the Fourth Amendment's reasonableness requirement—which we acknowledge applies, but is not transgressed by a subpoena lawful under the statute—and its warrant provisions—which do not apply to administrative examinations of books and records. *See* v. *City of Seattle*, 387 U.S. 541, 545, and *Camara* v. *Municipal Court*, 387 U.S. 523, 538–539, upon which petitioners rely, recognize the flexible application of the Fourth Amendment to administrative investigations, even where intrusion into private homes

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[1] *Giordano* v. *United States*, 419 F. 2d 564 (C.A. 8), certiorari denied, 397 U.S. 1037; *Shlom* v. *United States*, 420 F. 2d 263 (C.A. 2), certiorari denied, 397 U.S. 1074.

and places of business is involved. See also *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 77. Indeed, this Court has expressly held that probable cause need not be shown under the Internal Revenue subpoena statute even when the expiration of the statute of limitations requires that any subpoena be specifically based upon fraud. *United States* v. *Powell*, 379 U.S. 48.[1]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied. The Court may, however, wish to defer action on this petition until *Donaldson* v. *United States*, No. 65, this Term, is decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

SEPTEMBER 1970.

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[1] Nor do the facts in this case add anything to those in *Donaldson*. The district court's findings about the agents' purposes (upon which petitioners place great emphasis) add nothing to—and in fact fall short of—the description of the functions of the different types of revenue agents set forth in our *Donaldson* brief, matters appropriate for judicial notice.

U.S. GOVERNMENT PRINTING OFFICE 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 448

ANDREW KYRIACO, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA and CHARLES H. MORIYAMA, *Respondents*.

REPLY BRIEF FOR PETITIONERS

The brief for the United States in opposition in this case misstates both fact and law. This reply focuses on the Government's principal errors.

1. It Is Misleading for the Government To Claim That the Summonses Here Were Issued in a "Joint Investigation by Special Agents Moriyama and Regan and Revenue Agent Davis."

The District Court found that the summonses were issued in the course of an investigation undertaken by two Special Agents, Moriyama and Regan, that this was "not the 'continuing investigation' of tax liability referred to in *Boren* v. *Tucker*, 239 F.2d 767, 9th Cir. 1956," and that tax liability was being determined in this investigation "only as a necessity to a prosecutable criminal case." The Ninth Circuit accepted these find-

ings. The Government's veiled suggestion at page 3 of its brief that this case involves a "joint" civil and criminal investigation cannot be squared with these findings of the lower courts.[1]

2. It Is Not True That "the 'Criminal Purpose' Issue Will Be Reached in Donaldson Only If That Petitioner Convinces This Court That the Court of Appeals Erred in Denying Him Intervention . . . ."

The Fifth Circuit in the *Donaldson* case denied intervention because the petitioner there had not alleged sufficient facts to support his claim that section 7602 summonses were being used for an improper criminal purpose. *United States* v. *Mercurio*, 418 F.2d 1213, 1218 (1969). The Fifth Circuit denied intervention only after it had analyzed the "improper criminal purpose" issue in detail. Contrary to the Government's assertion at page 4 of its brief—that this Court must disagree with the Fifth Circuit's intervention decision in order to reach the "criminal purpose" issue—this Court *must* reach that issue unless it rejects the entire approach of the Fifth Circuit. Moreover, the Government's present position is strangely discordant with its statement at page 7 of its Memorandum in response

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[1] The Government's position is inconsistent with the fact that the investigation in question has been re-numbered criminal investigation since June, 1968. When a case is so designated, it passes from the preliminary stages and becomes a full-scale criminal investigation. Moreover, since the petition for certiorari was filed, the Intelligence Division of the District Director's Office has recommended criminal prosecution of one of the corporate petitioners and one of the individual petitioners, and a hearing in the Regional Counsel's Office has been scheduled. In other words, it is amply confirmed that the present Internal Revenue Service investigation of petitioners is solely for the purpose of gathering evidence for a criminal prosecution.

to the petition for certiorari in *Donaldson*—that the improper criminal purpose issue "would appear to be embraced in a grant of certiorari to review the right of petitioner to intervene in this case."

3. It Is Not True That Petitioners Acknowledge That There Is No Conflict Among the Decisions of the Courts of Appeals Which Warrants Resolution by This Court.

The Court is confronted with far more than "different rationales"—the term employed by the Government at page 4 of its brief. As petitioners specifically note at pages 23-26 of their petition, this case would have been decided in their favor under the rules enunciated by the Third, Fifth, and Sixth Circuits. Those Courts of Appeals have formulated rules which are in direct conflict with the views of the Ninth Circuit, other courts, and the Government. A frequent and important ground for the Court's assertion of its certiorari jurisdiction is to resolve conflicts between the circuits with respect to rules of law. It is unnecessary for the Court to defer exercise of this jurisdiction until conflicting rules are applied to produce conflicting results. To do so in this case would only prolong the confusion and uncertainty which presently exist among the lower courts.

4. No Inference Adverse to Petitioners Can Be Drawn From This Court's Denial of Certiorari in the Giordano and Shlom Cases.

Both of these cases were very inadequate for consideration of the "improper criminal purpose" issue. The section 7602 summons in *United States* v. *Giordano* was issued by a Revenue Agent, not a Special Agent; both lower courts found that the investigation was for the purpose of determining civil tax liability; and the

Government's purpose was not attacked on Fourth Amendment grounds. 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970). In *United States* v. *Shlom*, 420 F.2d 263 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970), the investigation in question was conducted by a Special Agent and a Revenue Agent jointly, and the "constitutional issue" to which the Government has referred at page 5 of its brief was simply that "the investigation of the criminal case and civil discovery went forward on a common front . . . ." Petition for certiorari, p. 12, *Shlom* v. *United States*, No. 1319, Oct. Term, 1969. Neither of these cases presented both the constitutional and the statutory aspects of the "improper criminal purpose" issue, nor did the records in these cases provide a context as compelling for the resolution of that issue as the one in the instant case.

5. The Government Is Completely Wrong To Assert That the "Warrant Provisions" of the Fourth Amendment Do Not Apply in This Case.

The Government contends at page 5 of its brief that the "warrant provisions" of the Fourth Amendment "do not apply to administrative examinations of books and records." But here we do not have a mere "administrative" examination in the sense in which that term is used in the case authorities—*i.e.*, to describe an agency's civil investigations, in contradistinction to criminal investigations focused on a particular individual. *Camara* v. *Municipal Court*, 387 U.S. 523, 530, 533-34, 535, 537, 539 (1967); *See* v. *City of Seattle*, 387 U.S. 541, 543, 544-45 (1967). In this case, the District Court found that Special Agent Moriyama was conducting an "investigation where tax liability is to be determined only as a necessity to a prosecutable

criminal case."[2] This finding renders it unnecessary to analyze in detail the Government's interesting contention that the Fourth Amendment's "warrant provisions" do not apply in cases involving "administrative" investigations. It should be noted, however, that the warrant provisions do in fact apply to all administrative searches. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523, 538-39 (1967).

For the reasons stated in the petition for a writ of certiorari, a writ should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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[2] The Government is wrong to assume, at page 3 of its brief, that the possibility of a 50% fraud penalty will justify the use of section 7602 summonses in a criminal investigation. The Fourth Amendment applies as fully to proceedings involving such quasi-criminal provisions as it does to criminal proceedings. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965); *Boyd* v. *United States*, 116 U.S. 616, 633-34 (1886).

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 448

ANDREW KYRIACO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

This Court's opinion in *Donaldson* v. *United States*, No. 65, this Term, decided January 25, 1971, leaves no doubt, we submit, that the courts below correctly decided the present case on the record before them.

In their letter of December 11, 1970, however, petitioners call attention to the fact that some seven months after the court of appeals' decision in this case, criminal prosecution of two of the petitioners was recommended to the Department of Justice by the Internal Revenue Service. In our view, this new factual development is immaterial. The Court's opinion in *Donaldson* explicitly recognized that the critical question in these cases of alleged misuse of process is

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the validity of the *issuance* of the summons—whether, as here, it was "*issued* in good faith and prior to a recommendation for criminal prosecution" (slip op., p. 19, emphasis added).

Since the summonses were validly issued and should have been complied with, it follows that they should be enforced.[1] Otherwise, litigious delay in complying with valid summonses would be encouraged and, except in situations where limitations periods are nearing expiration, the government would be discouraged from attempting to instigate criminal proceedings as promptly as feasible, in the spirit of the constitutional guaranty of a speedy trial. Moreover, if criminal proceedings are actually brought against any of the petitioners, there will be an opportunity at the trial to hear any claim they may have that particular evidence should be excluded because of abuse of process (see *Donaldson*, slip op. at 14).

Nor does the fact that criminal prosecution of two of the petitioners has been recommended render the summons enforcement proceedings effectively moot as to them. As the Court recognized in *Donaldson*, internal revenue summonses are not used exclusively for the purpose of determining whether criminal proceed-

[1] See *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2), certiorari denied, 373 U.S. 902, and *United States* v. *Moriarity*, C.A. 7, No. 18446, decided December 22, 1970, holding that internal revenue summonses which were valid when issued should be enforced even though an indictment has been returned during the course of the enforcement litigation. But see *United States* v. *Monsey*, 429 F. 2d 1348 (C.A. 7), an earlier opinion by a different panel of the Seventh Circuit with respect to a related issue of discovery in an enforcement proceeding.

ings should be recommended; the investigation is also directed to determining civil tax liability. Enforcement of validly issued summonses is therefore appropriate to complete the civil investigation authorized by Congress and, in a case like the present one in which an indictment has not yet been sought, the information obtained might also affect the determination of whether to seek an indictment.

It remains our view, therefore, that certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

I. The Summonses in This Case, Even if Good Under Donaldson When Issued, Are Now Unenforceable Because Criminal Prosecutions Are Currently Pending Against Petitioners

In *Donaldson* v. *United States*, No. 65, this Term, decided January 25, 1971, this Court held that "under § 7602 an internal revenue summons may be *issued* in aid of an investigation if it is *issued* in good faith and prior to a recommendation for criminal prosecution." (Slip op. p. 19. Emphasis added.) The Court's opinion indicated that the Revenue Service could not use a summons *issued after* a recommendation for prose-

cution. It left open the question whether a summons *issued before* a recommendation for prosecution could legitimately be *enforced after* such recommendation.

This case presents the question left undecided in *Donaldson*. Between the issuance of the summonses in question in this case and the present time, a criminal prosecution has been commenced against two of the petitioners.* Only a court order can require these petitioners to turn over the information which is sought. Yet, by the Government's own admission, that information is to be used by the Department of Justice to aid a pending criminal prosecution. Supp. Mem. p. 3.

Enforcement of the instant summonses would constitute an abuse of both administrative and judicial process, an abuse clearly inconsistent with *Donaldson* and the Court's earlier decision in *United States* v. *Powell*, 379 U.S. 48, 58 (1964). In *United States* v. *Mousey*, 70-2 USTC ¶ 9578 (1970), the Seventh Circuit adopted this view in ruling that intervening events, particularly the commencement of a criminal prosecution, are relevant to whether a summons, proper when issued, may properly be enforced. As the Court of Appeals stated, "enforcement would be equally objection-

* As the Court recognized in *Donaldson*, and as the Government concedes (Brief, *Donaldson* v. *United States*, p. 36), a criminal prosecution begins when the IRS recommends a case to the Department of Justice for criminal prosecution. On December 4, 1970, the Internal Revenue Service recommended to the Justice Department that it commence criminal prosecution against two of the petitioners in the instant case. This was to be expected. As the District Court pointed out, from the very start this was an "investigation where tax liability is to be determined only as a necessity to a prosecutable criminal case" (App. 13a.), "not the 'continuing investigation' of tax liability referred to in *Boren* v. *Tucker*, 239 F. 2d 767, 9th Cir. 1956." (App. 12a-13a.)

able where the judicial action would itself effect an abuse of the summons." The *Monsey view* that a properly issued summons may not later be enforced if there has been an intervening criminal prosecution is merely a particularized application of this Court's ruling in *Powell*, that "it is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused."* 379 U.S. at 58.

It would be legalistic in the extreme to contend, with the Government, that a summons good when issued may be enforced notwithstanding an intervening criminal prosecution. The question is not how or when a summons may be issued, but whether the sensitive tool of compulsory administrative process may be used in aid of a criminal prosecution. In *Donaldson*, the Government conceded that "the administrative summons procedure can no longer be used" once a case has been recommended to the Department of Justice for prosecution. Government Brief, p. 36. The heart of the administrative summons procedure is not the *issuance*

* *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12, 16 (2d Cir. 1962), *cert. denied* 373 U.S. 902 (1963), is in conflict with *Monsey*, but it was decided before this Court had clarified the limits on the IRS investigative powers in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), and *United States* v. *Powell*, 379 U.S. 48 (1964). Subsequent cases have cast doubt on *Magnus*. See *Venn* v. *United States*, 400 F.2d 207, 210 and n.6 (5th Cir. 1968). The Government also relies on *United States* v. *Moriarty*, 71-1 USTC ¶ 9125 (7th Cir. 1971), but that decision specifically distinguished the case before it from one in which "the summons was admittedly issued to aid the Department of Justice" in a criminal prosecution. As noted in the text, there is no meaningful distinction between obtaining information by issuing a summons or by enforcing one, and, since the civil aspects of the present case are in abeyance, the only imminent use to which the information would be put is in the pending criminal prosecution.

of a summons but the *obtaining* of summoned documents or testimony by compulsory process. Clearly, the teaching of *Donaldson* is that it is improper for such compulsory process to be used—whether by *issuance* or *enforcement* of a summons—once a criminal prosecution has commenced.

Finally, it should be emphasized that there are no practical considerations of any import which might require a result adverse to petitioners. Litigious delay in complying with summonses is unlikely after *Donaldson*. Further, the Government will invariably transfer arguably meritorious cases to the Justice Department for criminal prosecution if there is substantial danger that applicable statutes of limitations have placed the case in jeopardy. Supp. Mem. p. 2. And, now that the case has been placed in the hands of the Justice Department, the Revenue Service has no present need for the records sought, for civil aspects of a tax investigation are held in abeyance during the pendency of a criminal prosecution. See Petition, p. 17, n.16.

An administrative agency should not act as cat's-paw for criminal law enforcement agencies. In *Abel* v. *United States*, 362 U.S. 217, 226 (1960), this Court specifically condemned "the deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case. . . ." Permitting enforcement of the summonses in this case can amount to nothing else.

For the foregoing reasons, the Court should grant a writ of certiorari to consider whether the summonses in question may now be enforced.

II. The Fourth Amendment Objection Presented in This Case Was Not Decided in Donaldson and Requires That the Decision Below Be Reversed

In *Donaldson* this Court spoke as follows:

> Despite the contrary intimations in the motions to intervene, there is now no constitutional issue in the case. The taxpayer on oral argument so conceded. In any event, that question appears to have been settled long ago when the Court upheld, against Fourth Amendment challenge, an internal revenue summons issued under the Revenue Act of 1921 and directed to a third-party bank. *First Nat'l Bank* v. *United States*, 267 U.S. 576 (1925), affirming 295 F. 142, 143 (SD Ala. 1924). See also *United States* v. *First Nat'l Bank*, 274 F. Supp. 283, 284 (ED Ky. 1967), aff'd, 390 U.S. 199, and *United States* v. *Shlom*, 420 F.2d 263, 266 (CA 2 1969), *cert. denied*, 397 U.S. 1074.

No constitutional issue was presented or raised in the *Donaldson* case because the taxpayer under investigation there had no proprietary or privilege interest in the bank records which were sought from third parties. Similarly, no valid Fourth Amendment claim was present in the *First National Bank of Mobile* case, cited in the *Donaldson* opinion, because the bank from which records were sought and which raised the question was not the subject of an investigation, and the taxpayer who was did not object.*

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* Further, the Supreme Court's *per curiam* affirmance of the District Court's decision in *First National Bank of Mobile* was based entirely on the authority of four cases involving grand jury subpoenas duces tecum: *Essgnee Co. of China* v. *United States*, 262 U.S. 151 (1923); *Wheeler* v. *United States*, 226 U.S. 478 (1913); *Wilson* v. *United States*, 221 U.S. 361 (1911); *Hale* v. *Henkel*, 201 U.S. 43 (1906).

The *First National Bank of Pikeville* decision, also cited in the

Unlike the taxpayer in *Donaldson*, as the Court emphasized, (Slip op., pp. 5-6), petitioners here are both the taxpayers under investigation and the owners of the books and records sought by the Internal Revenue Service. In these circumstances, it seems clear that the summonses in issue in this case are being used in violation of the Fourth Amendment. See Petition at pp. 17-21. In particular, under *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *City of Seattle*, 387 U.S. 541 (1967), reaffirmed this year in *Wyman* v. *James*, —— U.S. ——, 39 L.W. 4085, 4090 (1971), it is clear that mere administrative process, utilized without proof of probable cause or review by an independent magistrate, cannot constitutionally be employed when the investigation has become criminal in nature, has focused on a particular individual, and has come under the supervision and control of the Department of Justice.

The *Donaldson* opinion made it clear that the *statute* authorizes the use of an IRS summons in an investigation which has criminal as well as civil overtones, "if it is issued in good faith and prior to a recommendation for criminal prosecution." (Slip op. p. 19.) *Donaldson* did not resolve the *constitutional* question whether a taxpayer who is the subject of an investigation which is principally criminal may resist a section

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Donaldson opinion, did not involve the Fourth Amendment issue presented here. Petition, p. 19, n.23. Further, although this Court declined review in *United States* v. *Shlom*, 420 F.2d 263 (1969), *cert. denied* 397 U.S. 1074 (1970), it also declined review in *Hinchcliff* v. *Clarke*, 371 F.2d 697 (6th Cir.), *cert. denied* 387 U.S. 941 (1967), where the Court of Appeals affirmed the use of a section 7602 summons over constitutional objection only on condition that the Government make no criminal use of the information obtained.

7602 summons issued in order to obtain *his* books and records.

That issue, squarely presented in this case, involves balancing the Government's need for relevant information against essential constitutional rights. It is fully possible, however, to protect the Fourth Amendment rights of taxpayers without stultifying the enforcement of federal law, for there are alternative, well-established means by which the Revenue Service can obtain information.* This fundamental Fourth Amendment issue, not resolved in *Donaldson*, will continue to be raised until resolved by this Court.**

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and set this case for oral argument.

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* Under 26 U.S.C. § 7608, Revenue Service agents are empowered to, and do, use search warrants. *E.g., United States* v. *Premises, 801 North Seventh Street*, 70-1 USTC ¶ 9412 (S.D. Ill. 1970). Grand jury subpoenas also can be used where crime is suspected.

** *E.g., Held* v. *United States*, No. 1306, October Term, 1970, Petition, p. 3.